Supreme Court, U.S.
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NO. 95-1436

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1995

PEOPLE OF THE STATE OF ILLINOIS,

Petitioners,

v.

JOHN KIMERY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ILLINOIS

BRIEF IN OPPOSITION

Fred M. Morelli, Jr.
Counsel of Record
Vincent Argento, Of Counsel
Counsel for Respondent
403 West Galena Boulevard
Aurora, IL 60506
708/892-6665

42 pp

QUESTIONS PRESENTED FROM REVIEW

1) Whether prior punishment in a forfeiture action bars further punishment in a criminal action for the same offense under the double jeopardy clause in the Fifth Amendment to the Constitution of the United States (US Const. Amend. V).

2) Whether forfeiture is an offense or is punishment for an offense.

TABLE OF CONTENTS

PAGE NO.

1) Questions Presented for Review . . i

2) Table of Authorities iii

3) Constitutional Provisions and Statutes 1

4) Reasons Relied upon for Denial of Writ 3

5) Argument 3

I) Forfeiture is quasi criminal in nature and the double jeopardy clause in the Fifth Amendment bars two punishments for the same offense 3

II) The same elements are included in forfeiture for criminal activity and in the underlying criminal activity 22

6) Conclusion 26

7) Appendix 28

TABLE OF AUTHORITIES

PAGE NO.

Abbate v. United States,
359 U.S. 187; 79 S.Ct. 666;
3 L.Ed.2d 729 (1959) 4-5, 20

Austin v. United States,
509 U.S. ___; 113 S.Ct. 2801;
125 L.Ed.2d 488 (1993) . 6, 10, 12, 15, 16

Blockburger v. United States,
284 U.S. 299, 57 S.Ct. 180;
76 L.Ed. 306 (1932) 23

Boyd v. United States,
116 U.S. 611; 6 S.Ct. 524;
29 L.Ed. 746 (1885) 11

Coffey v. United States,
116 U.S. 436; 6 S.Ct. 437;
28 L.Ed. 684 (1865) 17

Department of Revenue of
Montana v. Kurth Ranch,
511 U.S. ___; 114 S.Ct. 1937;
128 L.Ed.2d 767 (1994) 6

PAGE NO.

Ex parte Lange, 18 Wall 163, 168;
21 L.Ed. 872 (1874) 8

Green v. United States,
355 U.S. 184; 78 S.Ct. 221;
2 L.Ed.2d 199 (1957) 4, 5, 20

Missouri v. Hunter,
459 U.S. 359; 103 S.Ct. 673;
74 L.Ed.2d 535 (1983) 19

North Carolina v. Pearce,
395 U.S. 711; 89 S.Ct. 2172;
23 L.Ed.2d 656 (1969) 4, 5

One 1958 Plymouth Sedan v.
Pennsylvania,
380 U.S. 693; 85 S.Ct. 1246;
14 L.Ed.2d 170 (1965) 12, 25

United States v.
$405,089.23 U.S. Currency,
33 F.3d 1210 (9th Cir. 1994)
. . . . . 4, 5, 19, 20, 21

PAGE NO.

United States v.
9844 S. Titan Court,
Unit 9, Littleton, Colorado,
(May), ___ F.3d ___
(Cons. No. 1285, 1290,
10th Cir., February 2, 1996) . . 22, 24
United States v. Brophil,
899 F.Supp. 1257 (1995) 22
United States v. Halper,
490 U.S. 435; 109 S.Ct. 1892;
104 L.Ed.2d 487 (1989)
. . . . . 4-7, 12, 13, 15-17, 19-20
United States v. James Daniel
Good Real Property,
510 U.S. ___; 114 S.Ct. 492;
126 L.Ed.2d 490 (1993) 7
United States v. Millan,
2 F.3d 17 (2d Cir. 1993) 21
United States v. Torres,
28 F.3d 1463 (7th Cir. 1994) . . . 22

PAGE NO.

United States v. Ursery,

59 F.3d 568, (6th Cir. 1995) . 18, 22, 24

United States v. U.S. Coin

and Currency,

401 U.S. 715; 91 S.Ct. 1041;

28 L.Ed.2d 434 (1971) 12

Constitutional Provisions and Statutes

United States Constitution, Amend. V

. . . . . 1, 4-6, 16-17

725 ILCS 150/2 . . . . . 1, 12, 14-15

720 ILCS 570/505 . . . . . 2, 23, 25

CONSTITUTIONAL PROVISIONS AND STATUTES

1) The Fifth Amendment to the Constitution of the United States (Complete text Appendix A, pertinent provisions are):

> " . . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . ." (US Const. Amend. V).

2) Section 2 of the Illinois Drug Asset Forfeiture Procedure Act (720 ILCS 150/2) (Complete text Appendix B, pertinent provisions are):

> Sec. 2: Legislative Declaration: the General Assembly finds that the civil forfeiture of property which is used, or intended to be used in, is attributable to, or facilitates the manufacture, sale, transportation, distribution, possession, or use of

substances in certain violations of the Illinois Controlled Substances Act (720 ILCS 570/100 et seq.) or the Cannabis Control Act (720 ILCS 550/1 et seq.) will have a significant beneficial effect in deterring the residing incidence of the abuse and trafficking of such substances within this State . . ."

3) Section 505(a) of the Illinois Controlled Substances Act (720 ILCS 570/505(a)) (Complete text Appendix C; pertinent provisions are):

"Sec. 505(a): The following are subject to forfeiture:

3) all conveyances including aircraft, vehicles or vessels, which are used, or intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession or concealment of

property described in paragraphs 1) and 2) but; . . ."

REASONS RELIED ON FOR DENYING THE PETITION FOR A WRIT

ARGUMENT

Respondent, JOHN KIMERY, opines that all issues presented for review by Petitioner are adequately analyzed and answered by the opinion of the Supreme Court of Illinois, (Appendix A to Petition for Writ) and by the opinion of the Appellate Court of Illinois, Second Judicial District (Appendix C to Petition for Writ); so Respondent did not file a prior response; and files this Response as requested by this Court.

I.

FORFEITURE IS QUASI-CRIMINAL IN NATURE AND THE DOUBLE JEOPARDY CLAUSE IN THE FIFTH AMENDMENT BARS TWO PUNISHMENTS FOR THE SAME OFFENSE.

There were two separate prosecutions of Respondent, JOHN KIMERY, and two separate punishments imposed on him in the Circuit Court for the 16th Judicial Circuit, Kane County, Illinois, in violation of the double jeopardy clause of the Fifth Amendment to the Constitution of the United States (US Const. Amend. V). North Carolina v. Pearce, 395 U.S. 711; 89 S.Ct. 2172; 23 L.Ed.2d 656, 694 (1969); United States v. Halper, 490 U.S. 435, 440; 109 S.Ct. 1892; 104 L.Ed.2d 487, 496 (1989); Green v. United States, 355 U.S. 184; 78 S.Ct. 221; 2 L.Ed.2d 199, 204 (1957); Abbate v. United States, 359 U.S. 187, 198-199; 79 S.Ct. 666; 3 L.Ed.2d 729, 736 (1959); United States v. $405,089.23 U.S. Currency, 33 F.3d 1210, 1215 (9th Cir. 1994).

The Fifth Amendment to the Constitution of the United States provides:

> "No person shall . . . be subject to the same offense to be twice put in jeopardy of life and limb . . ."
> (US Const. Amend. V)

In Pearce, (ibid; 23 L.Ed.2d 656, 694) and Halper, (ibid 104 L.Ed.2d 487, 496) this Court said that a person can not be twice prosecuted, or twice punished for the same offense.

In Green, (ibid; 2 L.Ed.2d 199, 204), and Abbate, (ibid; 3 L.Ed.2d 729, 736), this Court said that a person should not be subject to prosecution or required to defend himself more than once against charges based on the same alleged criminal conduct. See also, United States v. $405,089.23 U.S. Currency, (ibid; 33 F.3d 1210, 1215).

The proscription in the double jeopardy clause of the Fifth Amendment (US Const. Amend. V) against multiple punishments for the same offense is not of recent origin but has been better understood since the trilogy of United States v. Halper, 490 U.S. 435; 109 S.Ct. 1892; 104 L.Ed.2d 487 (1989); Austin v. United States, 509 U.S. ___; 113 S.Ct. 2801; 125 L.Ed.2d 488 (1993); and Department of Revenue of Montana v. Kurth Ranch, 511 U.S. ___; 114 S.Ct. 1937; 128 L.Ed.2d 767 (1994); and should be duly respected to the extent of dismissing criminal charges when appropriate. Forfeitures frequently cause multiple punishment for the same offense in violations of the double jeopardy clause in the Fifth Amendment to the Constitution of the United States (US Const. Amend. V) and should be closely scrutinized since

legislatures have realized the revenue producing capability of forfeiture and have extended forfeiture in many previously unheard of directions. United States v. James Daniel Good Real Property, 510 U.S. ___; 114 S.Ct. 492; 126 L.Ed.2d 490, 504, 505 (1993).

In United States v. Halper, 490 U.S. 435, 440; 109 S.Ct. 1892; 104 L.Ed.2d 487, 496 (1989), this Court said:

> "As early as 1641, the Colony of Massachusetts in its "Body of Liberties" stated: "no man shall be twice sentenced by Civil Justice for one and the same crime, offense, or trespass" . . .
>
> "In our case law too, this Court, over a century ago, observed: If there is anything settled in the jurisprudence of England and America, it is that no man can be twice

lawfully punished "for the same offense. Ex parte Lange, 18 Wall 163, 168; 21 L.Ed 872 (1874)."

Respondent, JOHN KIMERY, contends that he was twice punished for the same offense.

On November 17, 1991, the State of Illinois commenced a separate action in the Circuit Court for the Sixteenth Judicial Circuit, Kane County, Illinois, as No. 91 MR 438, to forfeit a 1982 Maroon Ford Mustang owned by Respondent, JOHN KIMERY (K SC 1-A), and alleged that on October 6, 1991, Respondent allegedly drove his automobile to 1115-1119 Kane Street, Aurora, Illinois, and there purchased for forty dollars ($40.00) from LARRY HARRIS a small plastic bag containing a white powdery substance which field tested for cocaine (K SC 1-A).

On May 26, 1992, after a bench trial, Judge James Quetsch ordered that Respondent's 1982 Maroon Ford Mustang was forfeited to the Director of the Illinois State Police for disposition (K SC 40, 41); and on February 22, 1994, the Appellate Court of Illinois for the Second Judicial District affirmed Judge Quetsch's forfeiture order. People v. One 1982 Maroon Ford Mustang, (2d Dist. 1994), 258 Ill.App.3d 127.

On October 22, 1991, in a separate proceeding, the State of Illinois indicted Respondent, JOHN KIMERY, in the Circuit Court for the Sixteenth Judicial Circuit, Kane County, Illinois, as No. 91 CF 1649, for unlawful possession of the same alleged controlled substance (cocaine) weighing less than 15 grams (a Class 4 Felony) which Respondent allegedly

purchased from LARRY HARRIS on October 6, 1991 (K C 5).

On April 12, 1993, Respondent waived a jury trial and pled guilty to the criminal charges pending against him for unlawful possession of a controlled substance (cocaine) (K C 53, 54).

On July 8, 1993, after the decision of this Court in Austin v. United States, 509 U.S. ___; 113 S.Ct. 2801; 125 L.Ed.2d 488 (1993), and before sentencing, Respondent, JOHN KIMERY, moved to withdraw his guilty plea and to dismiss the criminal charges pending against him on the grounds of double jeopardy resulting from the prior forfeiture of his 1982 Maroon Ford Mustang on May 25, 1992. (K C 58, 63).

On October 15, 1993, Judge Barry Puklin denied Respondent's Motion and sentenced Respondent to imprisonment for

one year (K C 83, 89). The Appellate Court of Illinois for the Second Judicial District reversed Judge Puklin and dismissed the criminal charges against Respondent.

It is illusory to perceive that these two separate civil and criminal proceedings at different times before different judges were a single prosecution as Petitioner, STATE OF ILLINOIS, suggests.

Two (2) historical concepts control whether Respondent, JOHN KIMERY, was twice punished for the same offense:

First: Forfeiture of Respondent's 1982 Maroon Ford Mustang, although filed and labeled as a civil action (91 MR 438) (K SC 1-A) is criminal in nature and Constitutional protection in criminal cases applies. Boyd v. United States, 116 U.S. 611, 633, 634; 6 S.Ct. 524; 29

L.Ed.2d 746, 752 (1885); United States v. Halper, 490 U.S. 435, 447, 448; 109 S.Ct. 1892; 104 L.Ed.2d 487, 501 (1989); United States v. U.S. Coin and Currency, 401 U.S. 715, 718; 91 S.Ct. 1041; 28 L.Ed.2d 434, 437-439 (1971); One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 696; 85 S.Ct. 1246; 14 L.Ed.2d 170, 173, 174 (1965).

Second: Forfeiture of Respondent's 1982 Maroon Ford Mustang was intended by the legislature to deter drug activity; so forfeiture of Respondent's automobile was punishment. Section 2 of the Illinois Drug Asset forfeiture Procedure Act (725 ILCS 150/2); Austin v. United States, 509 U.S. ___; 113 S.Ct. 2801; 125 L.Ed.2d 488, 497, 498 (1993); United States v. Halper, 490 U.S. 435, 448, 449; 109 S.Ct. 1892; 104 L.Ed.2d 487, 501, 502 (1989).

In Austin, (ibid; 125 L.Ed.2d 488, 503), this Court said:

"We conclude therefore that forfeiture generally and statutory in rem forfeiture in particular historically have been understood, at least in part, as punishment."

In Halper, (ibid; 104 L.Ed.2d 487, 501), this Court said:

"Simply put, a civil as well as a criminal sanction constitutes punishment when the sanction as applied in the individual case serves the goals of punishment . . . (104 L.Ed.2d 487 at 502). . . . a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can be explained as also serving either retributive or deterrent purposes is punishment as we have come to understand the term."

Section 2 of the Illinois Drug Asset Forfeiture Procedure Act (725 ILCS 150/2) provides:

> "Sec. 2: Legislative Declaration: The General Assembly finds that the civil forfeiture of property which is used or intended to be used in, is attributable to, or facilitates the "manufacture, sale, transportation, distribution, possession or use of substances in certain violations of the Illinois Controlled Substances Act (720 ILCS 570/100, et seq.) or the Cannabis Control Act (720 ILCS 550/1, et seq.) will have a significant beneficial effect in deterring the rising incidence of the abuse and trafficking of such substances within this State . . ."

Since forfeiture under Section 2 of the Illinois Drug Asset Forfeiture Procedure Act (725 ILCS 150/2) is intended to deter, forfeiture under this Act is punishment.

Both Halper and Austin were decided under the excessive fines clause of the Eighth Amendment to the Constitution of the United States which provides:

> "Excessive bail shall not be required, nor excessive fines imposed . . ." (US Const. Amend. VIII).

Halper was an action to collect a fixed penalty in the amount of $130,000 provided by statute for medicare fraud.

Austin was an action to forfeit a mobile home and body shop for a casual delivery of a small amount of cocaine (two (2) grams) in the body shop.

Petitioner, STATE OF ILLINOIS, argues (Pet. P. 7, 8) that Austin was decided

under the Eighth Amendment to the Constitution of the United States (US Const. Amend. VIII); and that this Court did not grapple with and settle the double jeopardy argument under the Fifth Amendment to the Constitution of the United States (US Const. Amend. V).

It is true that most of this Court's discussion in Austin explained why forfeiture is punishment; but the State's argument overlooks that much of this Court's discussion in United States v. Halper, 490 U.S. 435; 109 S.Ct. 1892; 104 L.Ed.2d 487, 496, 497, 501, 502, dealt with punishment under the double jeopardy clause of the Fifth Amendment to the Constitution of the United States (US Const. Amend. V) and concluded:

> "We therefore hold that under the double jeopardy clause a defendant who already has been punished in a

> criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only a deterrent or retribution." Halper, (ibid; 104 L.Ed.2d 487 at page 502).

This language indicates that this Court grappled with the double jeopardy issue and concluded that a person may not be twice punished for the same offense by separate criminal and civil proceedings.

This Court reached the same conclusion in Coffey v. United States, 116 U.S. 435, 445; 6 S.Ct. 437; 29 L.Ed. 684, 687 (1865).

Petitioner, STATE OF ILLINOIS, suggests that respecting the Fifth Amendment to the Constitution of the United States (US Const. Amend. V) proscribing multiple punishments for the

same offense requires dismissal of the criminal proceedings against Respondent since forfeiture of his 1982 Maroon Ford Mustang occurred first and was a prior punishment (Pet. p. 8). This suggestion should be addressed to the Legislature and not to the Courts. Respondent respectfully submits that this Court cannot be unmindful of the prevailing attitude of many Legislators that they can ignore substantive Constitutional rights as expediency or political action dictates.

In United States v. Ursery, 59 F.3d 568 (6th Cir. 1995), the United States Court of Appeals for the Sixth Circuit held that a prior forfeiture of property was prior punishment and barred subsequent criminal prosecution for the same underlying criminal offense.

On the other hand, in United States v. $405,089.23 U.S. Currency, 33 F.3d 1210 (10th Cir. 1994), the United States Court of Appeals for the Tenth Circuit held that a prior criminal conviction and sentence was a prior punishment and barred subsequent forfeiture of property for the same offense.

Undoubtedly the legislature may provide for alternative multiple punishments in the same criminal proceeding. United States v. Halper, (1989), 490 U.S. 435, 451; 109 S.Ct. 1892; 104 L.Ed.2d 487, 503; Missouri v. Hunter, 459 U.S. 359, 366-369; 103 S.Ct. 673; 74 L.Ed.2d 535, 542-543 (1983). The Illinois Legislature has done this by providing fines, imprisonment, periodic imprisonment, probation, supervision, community service, and restitution as sentencing alternatives in criminal cases.

(730 ILCS 5/5-5-3). The Legislature can include forfeiture as one of the sentencing alternatives. But the legislature cannot provide for a separate prosecution for each punishment. Halper, (ibid; 104 L.Ed.2d 487, 503); United States v. $405,089.23 U.S. Currency, (9th Cir. 1994), 33 F.3d 1210, 1215; Green v. United States, 355 U.S. 184; 78 S.Ct. 221; 2 L.Ed.2d 199, 204 (1957); Abbate v. United States, 359 U.S. 187, 198-199; 79 S.Ct. 666; 3 L.Ed.2d 729, 736 (1959).

Respondent respectfully submits that separate prosecutions with separate punishment imposed by different Judges (as in this case Judge Quetsch (civil 91 MR 438) and Judge Puklin (criminal 91 CF 1649)) is not one single coordinated prosecution as Petitioner, STATE OF ILLINOIS, suggests and can result in excessive punishment. In such cases

mitigating factors are not persuasive, and each Judge is inclined to enhance the penalty. Each alternative multiple punishment when separately imposed in a separate prosecution will appear less severe than when cumulated and considered together in one prosecution (as in this case one year imprisonment (K SC 83, 89) and forfeiture of an automobile (K SC 40, 41) for possession of a small amount of cocaine ($40.00 worth) for personal use).

Petitioner, STATE OF ILLINOIS, cites United States v. Millan, (2d Cir. 1993), 2 F.3d 17, to justify separate criminal and civil prosecutions. Millan, (ibid; 2 F.3d 17), represents a minority opinion; the majority opinions distinguish or refuse to follow Millan. United States v. $405,089.23 U.S. Currency, 33 F.3d 1210, 1215 (9th Cir. 1994); United States v. Ursery, 59 F.3d 568, 574 (6th Cir. 1995);

United States v. Torres, 28 F.3d 1463, 1465 (7th Cir. 1994); United States v. 9844 South Titan Court, Unit 9, Littleton, Colorado, (May) ____ F.3d ___, (Cons. No. 1285-1290, 10th Cir., February 2, 1996); United States v. Brophil, 899 F.Supp. 1257 (1995).

II.

THE SAME ELEMENTS ARE INCLUDED IN FORFEITURE FOR CRIMINAL ACTIVITY AND IN THE UNDERLYING CRIMINAL ACTIVITY.

The criminal charges against Respondent, JOHN KIMERY, (KC 5), and forfeiture of his 1982 Maroon Ford Mustang (K SC 40, 41) arose out of the same alleged criminal conduct, i.e. the alleged unlawful possession by Respondent of an alleged controlled substance (cocaine) which Respondent allegedly purchased from LARRY HARRIS (K SC 1-A).

Petitioner, STATE OF ILLINOIS,

suggests that the criminal charges against Respondent and forfeiture of his automobile have different elements so are not the same offense.

The issue is not whether the criminal charges against Respondent and forfeiture of his automobile have the same elements and are the same offense but whether his automobile was used in commission of the underlying criminal offense so that forfeiture of his automobile was prior punishment for the same criminal activity. (720 ILCS 570/505(a)(3)). Forfeiture is punishment for a criminal offense and not a separate criminal offense. Fines and imprisonment are not elements of criminal offenses but they are punishment for the offense.

Petitioner, STATE OF ILLINOIS, misapprehends Blockburger v. United States, 284 U.S. 299, 304; 52 S.Ct. 180,

182; 76 L.Ed.2d 306 (1982). For two (2) offenses to be separate offenses, both must include a different element which the other does not. But two (2) offenses are not separate offenses just because one includes more elements than the other. United States v. Ursery, 59 F.3d 568- (6th Cir. 1995), and United States v. 9844 S. Titan Court, Unit 9, Littleton, Colorado, (May), ___ F.3d ____ (Cons. No. 1285-1290, 10th Cir., February 2, 1996).

An automobile is not contraband per se. Before an automobile can be forfeited, it must be tainted by some underlying criminal activity; and thus become derivative contraband; therefore, the underlying criminal activity (in this case the alleged unlawful possession by Respondent in his automobile of the same alleged controlled substance (cocaine) which he purchased from LARRY HARRIS) is

an element of the forfeiture of Respondent's 1982 Maroon Ford Mustang. One 1958 Plymouth Sedan v. Pennsylvania, 306 U.S. 693, 699; 85 S.Ct. 1246; 14 L.Ed.2d 170, 174 (1965).

Respondent's automobile may not be an element of the criminal charge against Respondent for alleged unlawful possession of a controlled substance (cocaine); but the underlying criminal charge against Respondent for alleged unlawful possession of a controlled substance in his automobile is a sine qua non element of the forfeiture of Respondent's 1982 Maroon Ford Mustang, (viz. using his automobile to facilitate possession of the same unlawful controlled substance) (720 ILCS 570/505(a)(3) without which Respondent's automobile could not have been forfeited.

CONCLUSION

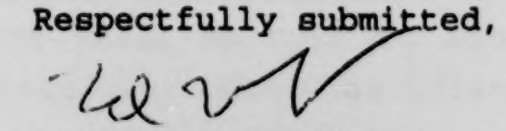
Civil forfeiture of Respondent's 1982 Maroon Ford Mustang was a prior punishment for the underlying alleged unlawful possession of a controlled substance (cocaine) which Respondent, JOHN KIMERY, allegedly purchased from LARRY HARRIS.

The Supreme Court of Illinois correctly decided that forfeiture of Respondent's automobile was a prior punishment; and that Respondent was being twice punished for the same offense and properly dismissed the criminal charges against him.

WHEREFORE, the Respondent, JOHN KIMERY, respectfully requests that this Court deny the Petition of Petitioner, THE STATE OF ILLINOIS, for a Writ of

Certiorari to review the decision of the Supreme Court of Illinois.

Respectfully submitted,



FRED M. MORELLI, JR.

Counsel of Record

Vincent Argento, Of Counsel

Counsel for Respondent

403 West Galena Boulevard

Aurora, IL 60506

708/892-6665

APPENDIX

APPENDIX A-1

CONSTITUTIONAL PROVISIONS AND STATUTES

The Fifth Amendment to the Constitution of the United States:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation." (US Const. Amend. V).

APPENDIX B-1

STATUTES

Section 2 of the Illinois Drug Asset Forfeiture Procedure Act (725 ILCS 150/2):

"Sec. 2: Legislative Declaration: The General Assembly finds that the civil forfeiture of property which is used or intended to be used in, is attributable to, or facilitates the manufacture, sale, transportation, distribution, possession, or use of substances in certain violations of the Illinois Controlled Substances Act (720 ILCS 570/100 et seq.) or the Cannabis Control Act (720 ILCS 550/1 et seq.) will have a significant beneficial effect in deterring the rising incidence of the abuse and trafficking of such substances within this State. While forfeiture may secure for state and local units of government some resources for deterring drug abuse and drug trafficking, forfeiture is not intended to be an alternative means of funding the administration of criminal justice. The General

Assembly further finds that the federal narcotics civil forfeiture statute upon which this Act is based has been very successful in deterring the use and distribution of controlled substances within this State and throughout the country. It is therefore the intent of the General Assembly that the forfeiture provisions of this Act be construed in light of the federal forfeiture provisions contained in 21 U.S.C. 881 as interpreted by the federal courts, except to the extent that the provisions of this Act expressly differ therefrom."

APPENDIX C-1

Section 505(a) of the Illinois Controlled Substances Act, (720 ILCS 570/505) provides:

Sec. 505 (a) The following are subject to forfeiture:

1) all substances which have been manufactured, distributed, dispensed, or possessed in violation of this Act;

2) all raw materials, products and equipment of any kind which are used, or intended for use in manufacturing, distributing, dispensing, administering or possessing any substance in violation of this Act;

3) all conveyances, including aircraft, vehicles or vessels, which are used, or intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession,

or concealment of property described in paragraphs 1) and 2), but:

i) no conveyance used by an person as a common carrier in the transaction of business as a common carrier is subject to forfeiture under this Section unless it appears that the owner or other person in charge of the conveyance is a consenting party or privy to a violation of this Act;

ii) no conveyance is subject to forfeiture under this Section by reason of any act or omisssion which the owner proves to have been committed or omitted without his knowledge or consent;

iii) a forfeiture of a conveyance encumbered by a bona fide security interest is subject to the interest of the secured party if he neither had knowledge of nor consented to the act or omission;

4) all money, things of value, books, records, and research products and materials including formulas, microfilm, tapes, and data which are used, or intended to be used in violation of this Act;

5) everything of value furnished, or intended to be furnished, in exchange for a substance in violation of this Act, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used, or intended to be used, to commit or in any manner to facilitate any violation of this Act;

6) all real property, including any right, title, and interest (including, but not limited to, any leasehold interest or the beneficial interest in a land trust) in the whole of any lot or tract of land and any appurtenances or improvements,

which is used to intended to be used, in any manner or part, to commit, or in any manner to facilitate the commission of, any violation or act that constitutes a violation of Section 401 or 405 of this Act {720 ILCS 570/401 or 720 ILCS 570/405} or that is the proceeds of any violation or act that constitutes a violation of Section 401 or 405 of this Act {720 ILCS 570/401 or 720 ILCS 570/405}.